

CLECs have long used wireless radio and microwave technologies to extend their networks, and this trend has accelerated rapidly in the past few years. *See id.* at II-17, Table 3. *Finally*, CLECs with fiber-optic networks have made clear that they can readily extend their existing networks reasonable distances to pick up large volumes of traffic.

In addition to being conservative, the Dense Wire Center plus collocation standard is easy to administer. As demonstrated in the UNE Fact Report, this methodology makes it easy to determine which ILEC wire centers are served by competitive interoffice transport. *See id.* at II-18, Table 4. As with the standards we propose for switches and loops, the standard we propose for interoffice transport will automatically adapt as CLECs expand their collocation facilities and more wire centers meet the threshold. Thus, even though competitive realities will not allow the Commission to adopt interoffice transport as a nationally mandated UNE, the Commission can adopt a national standard that is readily administered *and* reflective of competitive alternatives – and one that serves a self-executing sunset.

- **Dark Fiber**

The Commission seeks comment on whether the definition of “loops” or “transport” should include dark fiber. *Second FNPRM* ¶ 34. There are two independent and equally powerful reasons why the answer is no.

First, before the Commission may require any network element to be unbundled, the facility must satisfy the statutory definition of a “network element.” *See* 47 U.S.C. §§ 153(29), 251(c)(3). The 1996 Act defines those elements to include only those “facilit[ies] or equipment *used* in the provision of a telecommunications service.” *Id.* § 153(29) (emphasis added). At a minimum, the plain language of that definition means that, to qualify as a “network element,” a

particular piece of property must contribute in some way to an ILEC's provision of telephone service to its customers. It does not make sense to say that a facility is "used" to provide a "telecommunications service" – a term defined as the "offering of telecommunications for a fee directly to the public" (*id.* § 153(46)) – when that facility, by its very nature, *cannot* assist in the completion of a call or otherwise contribute to a LEC's ability to provide service to its customers.

"Dark fiber" is not, therefore, a network element. By definition, dark fiber – which is fiber-optic cable that is not connected to the electronics necessary for it to transmit data – does not contribute to an ILEC's provision of service. Rather, it is simply *unused* inventory.⁹³ Unsurprisingly, then, many state commissions and at least one federal court have determined that dark fiber does not qualify as a network element.⁹⁴

⁹³ See *U S WEST Communications, Inc. v. Serna*, No. Civ. 97-0539, 1998 U.S. Dist. LEXIS 13362, at *11 n.4 (D.N.M. Mar. 2, 1998) (dark fiber is "akin to an unused inventory") (emphasis added); *Investigation Regarding Local Exchange Competition for Telecommunications Services*, Docket No. TX95120631, at 113 (N.J. Bd. Pub. Utils. Dec. 2, 1997) (describing dark fiber as "unused fiber optic transmission media") (emphasis added).

⁹⁴ See *MCI Telecomms. Corp. v. Pacific Bell*, Nos. C97-0670SI *et al.*, at 35 (N.D. Cal. Sept. 29, 1998) (state commission decision denying access to dark fiber was "consistent with the Act"); *Application of MCI Telecomms. Corp. for Arbitration with GTE California, Inc.*, No. 96-09-012, at 34 (Cal. PUC Sept. 10, 1996) ("Since dark fiber is not used to provide telecommunications services, . . . GTEC should not be required to unbundle its dark fiber"); *Petitions by AT&T Communications of the Southern States, Inc., et al.*, Nos. 960833-TP *et al.*, at 22 (Fla. PSC Dec. 31, 1996) ("[W]e find that dark fiber is not a network element, as defined by the Act, because it is not a facility or equipment used in the provision of a telecommunications service."); *Petition of AT&T Communications of New York, Inc.*, Case 96-C-0723, at 69 (N.Y. PSC Nov. 29, 1996) ("dark fiber is not an element"); *Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecomms., Inc.*, Docket U-22145, at 43 (La. PSC Jan. 15, 1997) (dark fiber "is by definition not used, and therefore it is not a 'network element'"); *Petition of MCI Metro Access Transmission Services, Inc. for Arbitration to Bell Atlantic-PA, Inc.*, Docket No. A-310236F0002, at 25 (Pa. PUC Dec. 19, 1996) ("On dark fiber, we note that MCI's request goes well beyond the dictates of the Act and the FCC's *Local Competition Order*. . . . [W]e agree with Bell that dark fiber . . . is not a network element under the Act and is not subject to unbundling."). See also *Petitions for Approval of Agreements and Arbitration of Unresolved Issues*, Case No. 8731, at 26 (Md. PSC Nov. 8, 1996) (the Commission "disagree[s] with AT&T and MCI that Bell Atlantic should be required to provide" dark fiber); *Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc.*

This reading, moreover, accords with Congress's overriding intent in passing the 1996 Act. The central purpose of the 1996 Act is to encourage facilities-based competition. Congress intended to "give[] new entrants the incentive to build their own local facilities-based networks, rather than simply repackaging and reselling the local services of the local telephone company." 141 Cong. Rec. H8465 (daily ed. Aug. 4, 1995) (Rep. Goodlatte). The Commission has explained that "[t]he interconnection provisions of the Act, Section[s] 251 and 252, are designed to promote facilities-based local exchange competition."⁹⁵ Rules that provide new entrants with overly broad rights of access – in this case, rights to obtain facilities that are not even employed by the incumbent to provide service to its customers – are antithetical to facilities-based competition: An incumbent will have little incentive to invest to ensure an adequate supply of facilities to account for future growth if it may be required to turn over all of that inventory to its competitors at cost-based rates. By the same token, competitors will have little interest in undertaking the risks necessary to deploy their own facilities when they are given unlimited rights to lease not only the assets that an ILEC actually uses, but also its inventory. Thus, as the New York Public Service Commission explained, access to dark fiber would "provide an

and BellSouth Telecommunications, Inc., Docket No. 96-AD-0559, at 27-28 (Miss. PSC Feb. 12, 1997) ("BellSouth should not be required to provide dark fiber as an unbundled network element"); *Petition of MCI Telecomms. Corp. and MCImetro Access Transmission of Virginia, Inc.*, Case No. PUC960113, at 2 (Va. State Corp. Comm'n Dec. 20, 1996) ("BA-Va is not required to provide dark fiber as an unbundled network element."); *Petition of AT&T Communications of Indiana, Inc.*, Cause No. 40571-INT 02, at 17 (Ind. Util. Reg. Comm'n Dec. 12, 1996) ("dark fiber is not a network element as defined by the Act").

⁹⁵ Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 11 FCC Rcd 16639, 16678-79 [¶ 80] (1996).

unreasonable disincentive to competitive carriers to enter into facilities-based competition.”⁹⁶

And this lack of facilities-based competition will harm consumers who will have fewer options and pay higher prices.

Second, and more to the point in this proceeding, even if dark fiber qualifies as a network element, lack of access to it does not “impair” new entrants’ ability to provide service. *See* 47 U.S.C. § 251(d)(2). CLECs are in the same position as ILECs vis-à-vis dark fiber – it is commercially available to all carriers. Dark fiber has become a commodity that CLECs can purchase in a rapidly expanding wholesale market.⁹⁷ Major suppliers of dark fiber include Frontier Corp., GST Telecommunications, IXC Communications, Level 3 Communications, Metromedia Fiber Network, Qwest Communications, and Williams Communications. *See* UNE Fact Report at III-27, Table 8. Many utility companies are deploying fiber either on their own or in partnership with CLECs. *See id.* at III-28, Table 9. Moreover, there is no concern that CLECs lack the economies of scale to deploy fiber because fiber is typically deployed as a loop to extraordinarily large customers that need the connections fiber offers (roughly the equivalent of more than 10,000 voice-grade lines). *See id.* at III-26. Smaller customers can then use the fiber that already is in the ground, at little incremental cost.

⁹⁶ *Petition of AT&T Communications of New York, Inc.*, Case 96-C-0723, at 70 (N.Y. PSC Nov. 29, 1996).

⁹⁷ According to some estimates, “35% of the fiber already in the ground is ‘dark.’” T. Mack, *Fiber Frenzy*, *Forbes*, Apr. 19, 1999, at 252. Since June 1998, “the wholesale spot price of bandwidth is down 35%, thanks to ample supply.” *Id.* Bandwidth is now sold as a commodity through numerous clearinghouses, including Arbinet, AT&T Global Clearinghouse, GRIC Communications, IXTC WweXchange, and Ratexchange RTBX. *See* K. Henderson, *Market Makers Push “Telecommodities,”* *Phone+ Magazine*, Dec. 1998, available at <<http://www.band-x.com/uploadfiles/phone%20mag.htm>>.

Indeed, the strongest proof of that fact is CLECs' *actual* success obtaining and laying fiber. A multitude of CLECs are *already purchasing* fiber from various sources. AT&T, MCI, Sprint, Frontier, WinStar, Time Warner, RCN, Hyperion, e.spire, Intermedia, and many others are already obtaining the fiber they need from these alternative sources. *See id.* at III-27, Table 8. Moreover, these CLECs have long-term plans to continue doing so. For example, Electric Lightwave has a 20-year, \$101 million contract with IXC Communications for 2800 route-miles of fiber. STAR Telecommunications also has a 20-year, \$85 arrangement with Qwest that will allow it to cover all major metropolitan areas. e.spire's \$29 million deal with Metromedia Fiber Network will give it enough fiber to cover the New York-to-Baltimore intercity corridor as well as fiber for New York and Philadelphia. *Id.* And these are but a few examples. The Commission itself has found that CLECs "now have at least 11% of the total fiber optic system capacity potentially available to carry calls within local markets."⁹⁸ And the Commission's finding was based on a vast *understatement* of CLEC fiber. *Id.* at III-28.

Additionally, because local exchange carriers must afford nondiscriminatory access to their rights of way, poles, and conduits, CLECs have an equal opportunity to place fiber cabling in the field. That puts CLECs on the same playing field as ILECs. Section 251(d)(2) certainly requires nothing more than parity – indeed, the "impair" requirement is far more stringent, demanding that CLECs make a showing of need, not merely preference. If ILECs and CLECs operate under the same terms, CLECs cannot be deemed "impair[ed]." Thus, CLECs do not need access to dark fiber.

⁹⁸ *FCC Local Competition Report* at 2.

F. Operations Support Systems

Rule 319(f) required ILECs to provide access to OSS functions including pre-ordering, ordering, provisioning, maintenance and repair, and billing functions. SBC agrees that ILECs should provide CLECs access to all the ILEC OSS functions that our current systems are capable of providing to enable the CLEC nondiscriminatory access to interconnection, resold services, and other ILEC network elements. That is, SBC agrees that CLECs can make a sufficient showing of need under section 251(d)(2) to justify a Commission determination that ILECs must provide access to OSS functions when a CLEC takes a required network element, required interconnection offering, or required resold service from an ILEC.

ILECs do not, however, need to provide OSS functions to a CLEC to enable that CLEC to obtain a facility or service from a non-ILEC source. For example, as discussed above, an ILEC does not need to provide OSS functions that enable CLEC-1 both to order loops from the ILEC and to order switching from CLEC-2. If CLEC-1 wants to obtain loops from the ILEC and switching from CLEC-2, that is perfectly acceptable, and the ILEC's OSS can be used to order the loops, but CLEC-1 must itself make the arrangements to interconnect with, and hand traffic to, CLEC-2.⁹⁹ For the Commission to mandate otherwise would violate the Eighth Circuit's holding in *Iowa Utilities Board* that the Commission lacks authority to impose superior-quality requirements. The capacity to process orders for other carriers does not exist in ILEC OSS today

⁹⁹ As previously discussed, CLEC-1 can (1) collocate with the ILEC and cross-connect with CLEC-2; (2) share a collocation cage with CLEC-2; or (3) have CLEC-2 place the loop order on behalf of CLEC-1. All these are arrangements between CLEC-1 and CLEC-2. The ILEC cannot be required to act as the intermediary between the two.

and would have to be developed solely for the CLECs. 120 F.3d at 813 (“The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier.”).¹⁰⁰

CLECs cannot overcome the Eighth Circuit’s determination by arguing that the intermediary ILEC OSS functions are necessary for nondiscriminatory access to loops. *First*, even if loops must be unbundled, the standard for nondiscriminatory access to loops is simply that “the BOC must be able to deliver unbundled access to loops, of the same quality as the loops that the BOC uses to provide service to its own customers, to the competing carrier within a reasonable timeframe and with a minimum of service disruption.”¹⁰¹ This does not impose any obligation on the ILEC to participate in the CLECs’ use of the loop. *Second*, the standard for OSS access in conjunction with loops is that the BOC must provide competing carriers “nondiscriminatory access to the various functions of the BOCs’ OSS in order to obtain unbundled loops in a timely and efficient manner.”¹⁰² Again, this standard does not require the BOC/ILEC to develop new intermediary capabilities for CLEC-to-CLEC interactions. Such

¹⁰⁰ See also *Iowa Utils. Bd.*, 120 F.3d at 812 (“[S]ubsection 251(c)(3) does not mandate that requesting carriers receive superior quality access to network elements upon demand.”). This holding was not disturbed by the subsequent Supreme Court decision.

¹⁰¹ Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20712-13 [¶ 185] (1998).

¹⁰² *Id.* at 20712-13 [¶¶ 185-186].

interCLEC dealings are not governed by section 251(c)(3), and they certainly do not inform the analysis under section 251(d)(2).

In any event, there is no basis for concluding that CLECs would deal more effectively with each other by involving the ILEC and its OSS. One of the most fundamental of economic principles is that, in an open market, CLECs will work out the most efficient arrangement between themselves.

G. Operator Services and Directory Assistance

In its *Local Competition Order*, the FCC required operator services (“OS”) and directory assistance (“DA”) facilities to be unbundled. In reaching this conclusion, the FCC did not make any findings regarding competitors’ ability to provide directory assistance and operator services themselves, or to acquire such services from third parties. In light of the Supreme Court’s ruling, such an inquiry is now necessary, and the facts clearly establish that ILECs should not be required to provide access to their own directory assistance and operator services facilities as a UNE in any market.

Competition for operator services and directory assistance began soon after divestiture of the Bell companies in 1984.¹⁰³ Though this competition first emerged for interstate operator services and directory assistance, it has since grown to encompass local directory assistance as well. The FCC has noted, for example, that competitive “operator service providers (OSPs)

¹⁰³ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 406 U.S. 1001 (1983).

compete with local exchange and long distance carriers.”¹⁰⁴ Both the FCC and Congress have long recognized the existence of competitive operator service providers.¹⁰⁵

Operator services and directory assistance are typically provided on a wide regional or national scale. Large competitive call centers can serve single or multiple BOC regions. Generally, there are no separate business and residential product markets; operator services and directory assistance are generally uniform in price, quality, and functionality for business and residential consumers. Thus, unlike some of the other network elements, operator services and directory assistance are elements for which the Commission may adopt a nationwide rule as opposed to merely a standard; the facts dictate that the nationwide rule should be no required unbundling of operator services and directory assistance.

ILECs have no particular advantage in this market. As AT&T has conceded that, “[c]ompared with other ILEC network elements, CLECs have greater opportunity to establish, themselves or by contract, work centers for providing operator and/or directory assistance services.”¹⁰⁶ There is already a robustly competitive retail and wholesale market for operator services and directory assistance. And the necessary inputs to provide such services – databases, real estate, employees, and computers – are as accessible to CLECs as they are to ILECs. In fact,

¹⁰⁴ Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1489 [¶ 209] (1994).

¹⁰⁵ See, e.g., Second Further Notice of Proposed Rulemaking, *Billed Party Preference for InterLATA 0+ Calls*, 11 FCC Rcd 7274, 7298-99 [¶ 46] (1996) (“[H]undreds of OSPs now compete with AT&T, MCI, and Sprint in the operator services marketplace, compared to approximately the three dozen competitors that existed when Congress enacted [the Telephone Operator Consumer Services Improvement Act]”; 47 U.S.C. § 226 (imposing requirements on providers of operator services)).

¹⁰⁶ AT&T White Paper at 50 (submitted Feb. 1999).

the FCC has required ILECs to provide the ability to route traffic to a competitor's platform.¹⁰⁷

Competitive Directory Assistance and Operator Services Providers. Numerous companies are offering competitive directory assistance and operator services. The UNE Fact Report gives a more exhaustive list, *id.* at IV-2, Table 1, but a few examples make the point. Both AT&T and MCI have begun offering new national directory assistance services: AT&T's "00 INFO" and MCI's "10-10-9000." Their services are accessible from any telephone in the nation. *Id.* at IV-1. AT&T and MCI – along with Sprint – also provide a full range of operator services nationwide via toll-free 800 numbers. *Id.* at IV-1-2

These large CLECs are not alone in this market; a multitude of smaller CLECs provide their own OS and DA services or resell the services of other CLECs. *See id.* at IV-2, Table 1. There are numerous wholesale providers of OS and DA, operating one or more call centers and providing branded service to other carriers, including many CLECs. *Id.* at IV-5, Table 3. And, as the UNE Fact Report explains, CLECs do not need large call volumes to obtain directory assistance and operator services from these wholesalers. *Id.* at IV-5.

Once again, the surest proof of CLECs' ability to provide OS and DA is through examples of their actual experience. Teltrust, for example, provides services to numerous IXC's and CLECs. *Id.* at IV-4. Metro One Telecommunications customers include AT&T, AirTouch, and Sprint. *Id.* Excell is the outsourcing agent for AT&T's new nationwide directory

¹⁰⁷ *See Local Competition Order*, 11 FCC Rcd at 15773 [¶ 536] ("[W]e require incumbent LECs, to the extent technically feasible, to provide customized routing, which would include such routing to a competitor's operator services or directory assistance platform.").

information service, AT&T-00-INFO. *Id.* WinStar provides directory assistance obtained from Frontier. *Id.* at IV-5.

The Internet is also rapidly becoming a source of competition for traditional voice recorded directory assistance and operator services. *See id.* at IV-3, Table 2. Switchboard.com is the most widely used directory service on the Internet, and was ranked as the tenth most used web site by one study. *Id.* at IV-2. Other major directory services sites include InfoSpace, InfoNow, and Zip2.com. *Id.* at IV-3, Table 2. AT&T operates www.anywho.com, which contains extensive residential and business listings. *Id.* at IV-3. In addition to simple directory assistance, several Internet sites provide call completion options that compete with ILECs' OS. AT&T's Anywho offers a Click2Dial features, which enables users to complete calls to requested listings with software that AT&T provides for free at its site. *Id.* at IV-3-4. In March 1999, Qwest and Switchboard announced their plans to offer customers the ability "to automatically place calls from the Internet," using "web-based click-to-conference technology as well as other Internet-based communications services."¹⁰⁸

Competitive Suppliers of OS and DA Inputs. There are no significant entry barriers to additional entry by CLECs into the OS/DA market. CLECs can readily provide OS and DA because all of the key ingredients for those services are readily available.

1. *Listings.* CLECs may easily create their own databases with subscriber listing information from ILECs and other sources. Section 251(b)(3) of the Communications Act

¹⁰⁸ Switchboard Press Release, *Qwest Communications and Switchboard to Offer Web-Based Calling Services*, Mar. 29, 1999, available at <<http://www.switchboard.com/press/m990329.htm>>.

requires all LECs to provide CLECs with “nondiscriminatory access to . . . operator services, directory assistance, and directory listings.” 47 U.S.C. § 251(b)(3). Pursuant to this section, the FCC adopted Rule 217, which requires all LECs to “permit competing providers to have access to and read the information in the LEC’s directory assistance databases.” 47 C.F.R. § 51.217(c)(3)(ii). This guarantees CLECs nondiscriminatory access to the listing information of all local exchange carriers. With secure access to these listings, CLECs may establish their own OS/DA call centers, using their own operators, computers, and equipment.¹⁰⁹

CLECs may also create their own DA databases with directory listings from non-ILEC sources. The Supreme Court has held that the names, addresses, and telephone numbers listed in a LEC’s white pages are not protected by copyright.¹¹⁰ Its decision has led to a number of suppliers of such listings, the largest of whom include Metromail, VoltDelta, InfoUSA (formerly American Business Information), Dun & Bradstreet, R.R. Donnelley, Axicom Corporation, and The Berry Company. UNE Fact Report at IV-8. These companies supply CLECs and other competing providers with name, number, and address information on a local and nationwide basis. *Id.* AT&T has for years obtained directory listings from such sources. *Id.* In fact, both AT&T’s and MCI’s national directory assistance services utilize directory listing information

¹⁰⁹ Even if CLECs choose not to establish their own call centers, Rule 217 requires LECs to provide CLECs access to “[o]perator services and directory assistance services . . . in their entirety, including access to any adjunct features (e.g., rating tables or customer information databases) necessary to allow competing providers full use of these services.” 47 C.F.R. § 51.217(c)(3)(iv). LECs are required to provide these services on a branded or unbranded basis so that CLECs may substitute their own brand-name announcements for those of the LEC. *Id.* § 51.217(d). In light of these provisions, the only ostensible purpose of the OS/DA UNE is to enable CLECs to obtain what Rule 217 already grants them, but at a far lower, TELRIC-based price, and under the FCC’s rate structure rules for UNEs.

¹¹⁰ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

obtained from non-ILEC sources. These non-ILEC sources typically update their information on a daily basis from a variety of sources, thereby ensuring accuracy. *Id.* For example, InfoUSA invests \$30 million per year to compile its yellow and white page listings database, which are updated daily. *Id.*

Customer records increasingly are supplied by competitors themselves. CLECs have already begun compiling their own databases and even their own white pages. *Id.* at IV-9. As CLECs' share of local customers increases, they will increasingly become a critical source of data for all carriers. Thus, ILECs have strong incentives to share directory listings at a reasonable price with CLECs, to obtain reciprocal access to CLECs' subscriber listing information.

2. *Real Estate.* Another key ingredient of OS and DA services is real estate – an input unrelated to the ILEC telecommunications network and over which ILECs have no advantage. OS and DA can be provided on a nationwide basis through a single call center, or with a handful of regional centers. Teltrust, for example, serves the entire country with four centers. *Id.* at IV-9. McLeod USA operates one national call center. *Id.* InfoNXX provides operator services and directory assistance nationwide from four call centers. *Id.* at IV-9-10. And, as discussed above, nationwide directory assistance and operator services can also be provided with a single web site. CLECs such as AT&T and Qwest are already providing, or have plans to provide, web-based OS and DA services.

3. *Operators.* Service centers must be staffed with operators. ILECs obviously exercise no control over this labor market. For example, both AT&T and MCI employ their own operators, and Teltrust employs more than 900 operators. *Id.* at IV-10. In March 1999, Excell

announced an “aggressive hiring campaign” to hire 2000 new operators in order to meet the demands associated with being named the outsourcing agent for AT&T’s new nationwide directory information service, AT&T-00-INFO.¹¹¹

4. *Computers.* The final ingredient for DA and OS is computer equipment. The major hardware and software components of OS and DA are operator platforms, database applications, and search engines. The market for such equipment is undeniably competitive. There are at least three vendors that make all three components: Nortel, Volt Delta, and PC Plus. *Id.* In addition, IBM produces operator platforms and search engines, and Metromail makes database applications. Alcatel and Lucent also makes one or more of these components. *Id.*

As a result of these opportunities and the diverse competition in the market for OS and DA, ILECs have already lost significant volumes of OS and DA traffic. In SBC’s region, since 1995, directory assistance call volumes have decreased nearly 30 percent, and operator assistance calls have dropped by more than 50 percent, even though access lines have grown during this time. *See id.* at IV-5-6 & Fig. 1. The reason for this trend is clear: there are many alternative sources for CLECs and it is simply unnecessary for them to have access to the ILEC’s operator services and directory assistance. Therefore, under any meaningful definition of “necessary” and “impair” that complies with the Supreme Court’s direction, this should not be a required unbundled network element.

¹¹¹ Excell Agent Services Press Release, *Excell Agent Services Announces Aggressive Hiring Campaign*, Mar. 12, 1999.

H. Advanced Services

As it promised in its *Second Advanced Services Order*,¹¹² the Commission now seeks comment on whether network elements used in the provision of advanced services should be unbundled. As with directory assistance/operator services, this is one area that lends itself to a uniform national rule: no required unbundling.

Section 706(c)(1) of the 1996 Act defines “advanced telecommunications capability” as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” 47 U.S.C. § 157 note. The FCC has designated 200 kbps as the threshold of “advanced” or “broadband”¹¹³ services.¹¹⁴ This speed “is enough to provide the most popular forms of broadband – to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video.”¹¹⁵

There are a number of technological options available for providing advanced services, and the vast majority do not depend on the incumbent LEC’s network *at all*. Indeed, the Commission has already concluded that the traditional telephone plant is “not ideally suited for

¹¹² *Second Advanced Services Order* ¶ 17.

¹¹³ The Commission uses the shorthand term “broadband” “to refer to facilities that have ‘advanced telecommunications capability’ and/or services provided at retail to consumers on such facilities.” Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, FCC 99-5, at 1 n.2 (rel. Feb. 2, 1999) (“*Advanced Services Report*”).

¹¹⁴ *Id.* ¶ 20.

¹¹⁵ *Id.*

broadband.”¹¹⁶ Existing copper loops are “not broad or fast enough to be called ‘advanced.’”¹¹⁷ The provision of high-speed services requires virtually all new equipment – none of it is required for ordinary voice, cable, or radio services. Indeed, the technology in question was only very recently developed. Industry standards for the equipment – the catalyst for widespread acceptance and deployment – have emerged only recently, and some are still under negotiation. Thus, as the FCC has already acknowledged, there is no incumbent provider of advanced services.¹¹⁸

By definition, then, such new technologies are not uniquely available to the ILEC and, given the nondiscrimination and network disclosure safeguards already in place, the ILEC has no head start in their deployment. Under any proper section 251(d)(2) standard, therefore, ILECs should not be required to unbundle such new technologies.

The Commission has already made the factual findings that dictate this conclusion. In its *Advanced Services Report*, the Commission recognized that the advanced services market has myriad actual and potential competitors employing (or capable of employing) several different categories of broadband technologies. The Commission has concluded that the advanced services market is technologically heterogeneous, “accommodat[ing] different technologies such

¹¹⁶ *Id.* ¶ 46.

¹¹⁷ Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd 15280, 15281 [¶ 3] (1998).

¹¹⁸ See, e.g., *Advanced Services Report* ¶ 48 & n.103 (“the preconditions for monopoly appear absent” in the “last mile” of the advanced services market); *id.* (“[N]o competitor has a large embedded base of paying residential consumers” and there is no “indicat[ion] that the consumer market is inherently a natural monopoly.”); see also UNE Fact Report at VI-4, Table 1.

as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio.”¹¹⁹ “Numerous companies in virtually all segments of the communications industry are starting to deploy, or plan to deploy in the near future, broadband to the consumer market.”¹²⁰ Other providers, using other media, have already invested tens of billions of dollars in broadband facilities,¹²¹ including enormous investment in the deployment of facilities that serve the “last mile” to the home.¹²² Indeed, the Commission relied on the many alternative means of entering the market in concluding that the market has a bright competitive future:

The facts that different companies are using different technologies to bring broadband to residential consumers and that each existing broadband technology has advantages and disadvantages as a means of delivery to millions of customers opens the possibility of intermodal competition, like that between trucks, trains, and planes in transportation.¹²³

Entry into a market that supports “intermodal competition” by definition cannot be dependent on any one method. Because potential entrants do not need access to the ILEC’s network to be successful providers of broadband services, their ability to provide such services is not “impaired” by lack of such access. *See* 47 U.S.C. § 251(d)(2).

Although the UNE Fact Report lays out the factual story in more detail, even a brief overview of the current deployment by various providers demonstrates the multitude of

¹¹⁹ *Advanced Services Report* ¶ 48.

¹²⁰ *Id.* ¶ 12.

¹²¹ *See id.* ¶ 35 (“[P]ublicly available data show that many companies in virtually all segments of the communications industry have made tens of billions of dollars of investment in broadband facilities.”).

¹²² *See id.* ¶ 34.

¹²³ *Id.* (footnotes omitted).

alternatives available. In fact, the Commission has concluded that non-phone company providers, including cable companies, electric utilities, and wireless cable companies, are further along in last-mile deployment of broadband to residential customers than ILECs.¹²⁴

Cable. The FCC already recognizes that “[t]he most popular offering of broadband to residential customers is via ‘cable modems’ offered by cable television companies within their cable service territories.”¹²⁵ And the FCC’s Office of Plans and Policy has observed that “[t]he cable industry’s broadband platform makes cable an optimal medium for transmitting large amounts of digital information – data, graphics, and video – at high speeds.”¹²⁶

One-third to one-half of all cable networks already support two-way service, or will very soon. UNE Fact Report at VI-5. High-speed Internet access is available from cable operators to more than 20 million homes, or roughly 20 percent of the U.S. market. *Id.* More than 50 companies have deployed commercial cable modem services; cable modems are available in more than 100 local markets, including 25 of the top 30 MSAs. *See id.* at VI-5-7 & Table 2.

The future prospects for cable companies appear even stronger: cable operators are well financed and enjoy economies of scope and scale fully comparable to the ILECs. As the Commission has pointed out, leading companies – including AT&T/TCI, Comcast, Microsoft, and Compaq – are investing hundreds of millions of dollars to enter broadband via cable

¹²⁴ *See id.* ¶¶ 53-58.

¹²⁵ *Id.* ¶ 54 (footnote omitted).

¹²⁶ B. Esbin, Office of Plans and Policy, FCC, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30, at 77 (Aug. 1998).

television.¹²⁷ In 1997, the cable industry spent \$6 billion on the deployment of two-way broadband via high-speed cable modems. *Id.* at VI-8. As described in detail in the UNE Fact Report, cable operators have joined ranks with each other, and with the major equipment vendors, long-distance carriers, and Internet backbone providers to gain an even greater share of the broadband market. *See id.* at VI-10, Table 3. As a result, high-speed Internet cable service will be available to 30 million homes by the end of 1999. *Id.* at VI-8. According to one estimate cited by the Commission, 63 percent of all cable systems will be broadband-ready by 2001.¹²⁸

Cable is thus positioned to emerge as a fully independent, facilities-based provider of high-speed Internet access services. A significant number of observers predict that cable will be dominant – that it will stay out ahead of broadband alternatives offered over wireless media or copper loop. *Id.* at VI-9.

Wireless. The Commission also ranked wireless cable providers ahead of incumbent LECs as providers of advanced services.¹²⁹ “Wireless cable” includes providers of LMDS and MMDS.¹³⁰ In its *Advanced Services Report*, the Commission cited an estimate that several million residential customers could currently obtain broadband from wireless cable companies.¹³¹

¹²⁷ *Advanced Services Report* ¶ 37.

¹²⁸ *Id.*

¹²⁹ *See id.* ¶¶ 53, 57-58.

¹³⁰ *See id.* App. A, ¶ 8.

¹³¹ *Id.* ¶ 57.

The three major operational LMDS carriers providing advanced services are WinStar, Teligent, and Advanced Radio Telecom. WinStar provides wireless broadband service in 30 cities with access rights to 4200 buildings. *Id.* at VI-11. Teligent has networks in service in 26 markets and has agreements with 2400 buildings. *Id.* Advanced Radio Telecom provides service in three existing markets – Phoenix (AZ), Bellevue (WA), and Portland (OR). *Id.* The Commission found that “fixed wireless providers such as WinStar and Teligent are also possible providers of broadband in rural areas.”¹³² MMDS operators include CAI Wireless systems, CS Wireless Systems, Wireless One, Nucentrix (formerly Heartland Wireless Communications), ATI Telecasting, and People’s Choice TV. *Id.* at VI-14. The Commission found that, “[i]n a significant number of cities,” MMDS companies are “offer[ing] broadband services to residential consumers.”¹³³

These providers are expanding rapidly, and new providers are quickly emerging. For example, WinStar plans to be fully operational in 60 markets by the end of 2000. *Id.* at VI-11. Teligent expects to offer service in 40 markets across the country by the end of the year. *Id.* NEXTLINK plans to develop networks covering a majority of the nation’s top 30 markets by the end of 2000. *Id.* at VI-12. As the UNE Fact Report establishes, these carriers are well financed and have formed numerous strategic alliances. *See id.* at VI-13, Table 4.

¹³² *See id.* ¶ 71.

¹³³ *Id.* ¶ 57.

Utilities. The FCC has noted that “[a] growing number of public utilities are offering broadband within their utility service territories.”¹³⁴ “As of 1997, utilities had installed 40,000 route miles of fiber optic cable representing over 750,000 fiber miles, and they intend to install another 36,000 route miles in the next few years.”¹³⁵ Utility-based offerings have begun in numerous cities. *Id.* at VI-18-19.

Many utilities have formed partnerships with CLECs. *Id.* at VI-18. According to the FCC, utilities have also entered into “joint ventures with software and content providers.”¹³⁶ These utilities clearly have deep financial pockets. For example, the Commission notes that “[a]ctual and planned utility-affiliated ventures in Boston, New York, Philadelphia, Washington, and San Francisco areas have a capital budget for 1998 and 1999 that is estimated at \$850 million.”¹³⁷

Satellite. In its *Advanced Services Report*, the Commission noted that, “[s]ince 1993, over \$20 billion has been invested in the space industry, of which much has gone into the broadband satellite telecommunications sector.”¹³⁸ The nation’s largest DBS operator, DirectTV (owned by Hughes), already provides nationwide Internet access at speeds of up to 400 kbps. *Id.* at VI-15. The Commission has granted 14 Ka-band licenses, including 13 geostationary systems and one non-geostationary system, Teledesic, which will deploy a low

¹³⁴ *Id.* ¶ 55.

¹³⁵ *Id.* ¶ 40 (footnote omitted).

¹³⁶ *Id.* ¶ 55.

¹³⁷ *Id.* ¶ 40.

¹³⁸ *Id.* ¶ 39.

earth orbiting system. *Id.* According to the Commission, several of these licensees – including Loral’s CyberStar, Hughes’ Spaceway, Lockheed Martin’s Astrolink, SkyBridge, and Teledesic, among others – “are planning to enter the residential broadband market in the next decade.”¹³⁹ The operators themselves have announced much more rapid deployment schedules. *Id.* And, like cable, wireless, and utility providers, satellite providers have forged strategic alliances and received enormous financial backing. *See id.* at VI-17, Table 5.

Where do incumbent LECs fit into this picture? Right near the bottom, according to the Commission.¹⁴⁰ The FCC’s Office of Plans and Policy expressed the opinion that the analog modem bandwidth available over ILEC voice loops “is largely insufficient” to support real-time video transmissions over the Internet; the high-speed connections available from cable and other providers, by contrast, already support these services.¹⁴¹ High speeds enable content providers to deliver streaming video and audio, video e-mail, interactive advertising, video conferencing, and traditional (enhanced) video programming – none of which can be delivered effectively over low-speed lines.¹⁴² The graphics, CD-quality audio, and real-time video that can be delivered

¹³⁹ *Id.* ¶ 60.

¹⁴⁰ *Id.* ¶ 58.

¹⁴¹ K. Werbach, Office of Plans and Policy, FCC, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper No. 29, at 53 (Mar. 1997).

¹⁴² A. Davis (Wainhouse Consulting Group), *Cable Modems: A High-Bandwidth Solution to Internet Access*, Networked Multimedia for Business, Jan./Feb. 1998, available at <<http://www.bcr.com/dvcmag/janfeb/dvc7p6.htm>>.

over high-speed connections “constitute a different level of Internet and online interaction and satisfaction.”¹⁴³

Given the ILECs’ current lack of advantage and the multitude of alternative – and, according to the Commission, superior – means of entry, it cannot be said that network elements used for advanced services should be unbundled under any test for “necessary” and “impair.”

This already conclusive factual case would become even stronger if the Commission continued to require loop unbundling. With access to a conditioned loop (which SBC will supply as discussed further below) and collocation (a CLEC right that is now even more robust in the wake of the Commission’s recent collocation order),¹⁴⁴ CLECs have all the access they need to compete on equal footing with ILECs. There is simply no case to be made that CLECs need unbundled access to the new equipment deployed at the two ends of the wire such as Digital Subscriber Line Multiplexers (“DSLAMs”), fast-packet or ATM switches, or xDSL modems. ILECs can of course deploy such equipment, and are doing so. But CLECs can, too, whether over their own facilities or the ILEC’s unbundled loop. Indeed, the Commission’s collocation orders ensure that CLECs can attach their own equipment to ILEC loops on the same physical premises as ILECs can.¹⁴⁵

¹⁴³E. Melloul, Argus Research Corp., Investext Report No. 3372812, At Home Corp. — Company Report at *1 (Dec. 16, 1998).

¹⁴⁴ See *Second Advanced Services Order* ¶¶ 8, 44 (requiring shared cage and cageless collocation arrangements and “collocation at in adjacent controlled environmental vaults or similar structures to the extent technically feasible” when “space is legitimately exhausted in a particular LEC premise.”).

¹⁴⁵ See, e.g., *Second Advanced Services Order* ¶¶ 27-60; *Local Competition Order*, 11 FCC Rcd at 15782-807 [¶¶ 555-607]; Memorandum Opinion and Order, *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154 (1994); *Switched Transport Expanded Interconnection Order*, 8 FCC Rcd 7374; *Special Access Expanded Interconnection Order*, 7 FCC Rcd 7369.

CLEC experience in the market confirms that conclusion beyond any possible dispute. CLECs *already* provide advanced services in each of the 10 largest MSAs, and 25 of the top 50. They are in 21 States, and 273 cities. Most of these markets are served by multiple CLECs. By comparison, ILECs are offering xDSL service in only seven of the 10 largest MSAs and only 22 of the top 50. *Id.* at VI-19, VI-21, Table 6; *see also id.* at VI-23, Table 7. The Commission itself acknowledges that CLECs have already deployed *more* advanced-service equipment than ILECs over ILEC loops.¹⁴⁶ Indeed, the Commission ranks CLECs behind only cable companies and utilities in current deployment of advanced services.¹⁴⁷ CLECs are among the leading providers of dedicated access facilities to Internet Service Providers (ISPs), and, in many instances, CLECs own controlling interests in the nation's better-known ISPs. *Id.* at VI-22. CLECs offer advanced services to more than five million homes, and that number is predicted to quadruple in 1999. *Id.* The CLECs' own trade association insists that CLECs currently lead the ILECs in providing advanced services over ILEC loops and, according to the CLECs, they, not ILECs, are "driving the deployment of cutting-edge technology."¹⁴⁸

The UNE Fact Report shows that CLECs have access to significant resources and have formed numerous strategic alliances. *See id.* at VI-25, Table 8. CLECs have received multi-

¹⁴⁶ See *Advanced Services Report* ¶¶ 53, 56, 58 (outlining the current deployment of broadband facilities serving the last mile, "begin[ning] with those that seem most advanced in deployment at this time," and listing CLECs ahead of ILECs).

¹⁴⁷ See *id.* ¶¶ 53-56.

¹⁴⁸ See ALTS Press Release, *ALTS' Fall Education Seminar Proves Success of Telecom Act in Stimulating Broadband Data and Competitive Providers*, Sept. 18, 1998 available at <<http://www.alts.org/frames/newsandpr.htm>>.

million dollar backing from and forged strategic relationships with industry giants such as AT&T, Microsoft, MCI WorldCom, Intel, Lucent, ICG, NEXTLINK, and Qwest. *Id.*

ILECs have no technical edge in the advanced service equipment market either – they are not themselves manufacturers of the equipment, and an extensive array of rules, statutory provisions, and divestiture decree history either exclude ILECs from equipment markets entirely, or require open standards, advance disclosure of network changes, and scrupulously arms-length dealings between ILECs and any affiliates engaged in any manner in equipment markets.¹⁴⁹ CLECs, by contrast, have formed close technical alliances with a number of major equipment vendors. *See id.* CLECs buy exactly the same equipment as ILECs do to provide these services (e.g., DSL modems, ATM switches, DSLAMs, etc.), and CLECs buy it from exactly the same vendors. *Id.*; *see also id.* at VI-26, Table 9. ILECs are not the dominant providers of Frame Relay, Cell Relay, and ATM switching, and they have no competitive advantage in the selection and purchase of this type of equipment. Indeed, the only difference, to this point, is that the CLECs are the *larger* buyers – they have bought and deployed *more* of this equipment than ILECs have. And it will be even easier for CLECs to provide advanced services as the industry continues to develop uniform standards.

These facts – which the Commission itself found as recently as last February in its *Advanced Services Report* – demonstrate that meaningful alternatives to the incumbent network are available. In fact, the Commission believes that some of these alternatives are superior to the

¹⁴⁹ *See, e.g.*, 47 U.S.C. § 273(a), (c), (e)(1) and (2); Notice of Proposed Rulemaking, *Implementation of Section 273 of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996*, 11 FCC Rcd 21784, 21791 [¶ 11] (1996); *id.* at 21791-92 [¶ 12]; MFJ § (II)(D)(2) (1984).

incumbents' facilities. The Commission may not now reject the necessary inferences from its prior, uncontestable findings. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 118 S. Ct. 818, 829 (1998) (holding that an agency "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands").

Given the Commission's findings about advanced services, it appears that the only thing that could stop the progress of competition in this nascent market is mandatory unbundling itself. The Commission itself has noted that broadband "opens the possibility of *new facilities* to serve the last mile to the home."¹⁵⁰ But the potential social costs of unbundling are particularly severe when applied to new technologies, such as broadband facilities. As Michael Armstrong, Chairman of AT&T, recently acknowledged, "[n]o company will invest billions of dollars to become a facilities-based . . . services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and *get a free ride* on the investments and risks of others."¹⁵¹ Whatever the impact of unbundling rules on the *existing* telephone network, certainly no ILEC will undertake the significant risk of investing in *new* technologies without the prospect of a commensurably significant reward.¹⁵² The combination of an unbundling requirement and TELRIC pricing would completely eviscerate an ILEC's incentive to deploy

¹⁵⁰ *Advanced Services Report* ¶ 46 (emphasis added).

¹⁵¹ *Telecom and Cable TV: Shared Prospects for the Communications Future*, Remarks of C. Michael Armstrong, Chairman and CEO, AT&T, delivered to Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998) (emphasis added).

¹⁵² *See Jorde, Sidak, & Teece Aff.* ¶¶ 34-35 (explaining the risks associated with the deployment of new services and noting that "an unbundling policy aimed at unproven technologies that are necessary to support new services would severely damage the incentives for an ILEC to invest").

such technologies, by leaving the ILEC with all the risk and none of the reward.¹⁵³ And that would go against Congress's intent, which was "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies."¹⁵⁴ Consumers are harmed when new technologies never enter the market because of disincentives created by a regulatory regime.

- **Conditioned Loops**

As noted above, CLECs do not need *any* ILEC network element to provide advanced services because of the abundance of alternatives. But, if the Commission requires unbundling of the local loop for advanced services, SBC believes that ILECs need to provide conditioned loops only in those instances where they have already conditioned the loop. SBC is also willing to condition loops on demand, as long as a CLEC agrees to pay up-front a fair rate for the conditioning. CLECs must pay the cost up-front to guarantee that ILECs will be compensated for their work even if the CLEC abandons the provision of advanced services over the lines. This is nondiscriminatory as compared to retail service. For example, SBC charges its customers a \$900 up-front, nonrecurring charge when conditioning is required in order to provide the requested ADSL service. The CLEC should pay on the same basis when it is the CLEC that requests the conditioning. Along with collocation, this will ensure a level playing field for both CLECs and ILECs if the Commission determines that unbundled access to conditioned loops is required despite the abundance of other media available for broadband services.

¹⁵³ *Id.* ¶¶ 36-40.

¹⁵⁴ H.R. Conf. Rep. No. 104-458, at 1 (1996).

Whatever else the “necessary” and “impair” standards mean, they certainly do not mean that ILECs must provide CLECs terms for network elements that are *superior* to the terms available to ILEC retail customers. But that seems to be what the Commission proposes when it states that it “see[s] nothing in the statute or the Supreme Court’s opinion that would preclude us from requiring that loops that must be unbundled must also be conditioned in a manner that allows requesting carriers supplying the necessary electronics to provide advanced telecommunications services, such as digital subscriber line technology (xDSL).” *Second FNPRM* ¶ 32. It appears the Commission is considering a requirement that the incumbent LEC take affirmative steps to improve its loops so that those loops may be used to provide advanced services even if the incumbent does not itself offer advanced services over the loop and without requiring the CLEC to pay up-front a fair rate for the ILEC’s efforts.¹⁵⁵

But how can it be said that CLECs are impaired relative to ILECs when ILECs themselves do not have an already-conditioned loop, and would charge their retail customer, up-front, the costs of conditioning the loop? Put another way, the Supreme Court has already rejected the Commission’s conclusion that the “impairment” standard is met if “the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with

¹⁵⁵ Cf. Advanced Services Order ¶ 53.

providing that service over other unbundled elements in the incumbent LEC's network.”¹⁵⁶

Consequently, the Supreme Court would certainly reject a Commission standard that required incumbent LECs to provide CLECs with a *superior* service. And, without up-front compensation from the CLEC, that is exactly what the Commission would be requiring.

Section 251(d)(2) is not the only obstacle to the Commission's proposed requirement. The Commission must also overcome the Eighth Circuit's holding in *Iowa Utilities Board* that, under the general unbundling requirements of section 251(c)(3), the Commission lacks the authority to impose superior-quality requirements. In the *Local Competition Order*, the Commission made it quite clear that loop-conditioning requirements are a subspecies of that decision's broader requirement that an incumbent LEC provide their competitors, upon request, with access to network elements that are higher in quality than what the LEC provides to itself.¹⁵⁷ Indeed, the Commission specifically *singled out* loop conditioning as a paradigmatic illustration of its superior-quality requirement. The *Local Competition Order* offered, as an “*example*” of the superior-quality requirement, an incumbent LEC's obligation to “provide local loops conditioned to enable the provision of digital services (where technically feasible) even if the incumbent does not itself provide such digital services.”¹⁵⁸

¹⁵⁶ *Iowa Utils. Bd.*, 119 S. Ct. at 735 (quoting *Local Competition Order*, 11 FCC Rcd at 15643 [¶ 285]) (emphasis deleted).

¹⁵⁷ *See* 11 FCC Rcd at 15659 [¶ 314].

¹⁵⁸ *Id.* at 15659 n.680 (emphasis added).

On review of the *Local Competition Order*, the Eighth Circuit held that the Commission lacks authority to impose such superior-quality obligations.¹⁵⁹ The court of appeals explained that “subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC’s *existing* network – not to a yet unbuilt superior one.”¹⁶⁰ Section 251(c)(3) “does not mandate that incumbent LECs cater to every desire of every requesting carrier,” even if the incumbents will be “compensated for the additional cost involved in providing superior quality interconnection and unbundled access.”¹⁶¹ Relying on this analysis, the court of appeals vacated the specific Commission rule (47 C.F.R. § 51.311(c)) that purported to require incumbents to provide such superior access to network elements upon request.¹⁶²

In light of the Eighth Circuit’s holding, it would be improper for the Commission to adopt a requirement that incumbent LECs provide CLECs with conditioned loops, without fair compensation, when the incumbent LEC has not yet conditioned the loop for itself. At the very least, then, the ILEC is entitled to up-front payment for the costs of the conditioning, as would be recovered from an end user ordering retail service.

- **Line-Sharing**

The Commission is also considering a requirement that ILECs unbundle virtual space within individual telephone loops (“spectrum unbundling” or “line sharing”). Without line

¹⁵⁹ See *Iowa Utils. Bd.*, 120 F.3d at 813.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *id.* at 819 n.39. This ruling was not altered in any way by the subsequent Supreme Court review.

sharing, the Commission fears that “the competing carrier effectively may be forced to provide both voice and data over the local loop it leases from the incumbent.”¹⁶³ A line-sharing requirement does not comport with section 251(d)(2) for several reasons.¹⁶⁴

First and foremost, CLECs do not need line-sharing to provide either voice or data – separately or together. As to the data: CLECs do not need access to *any* network element, let alone special access to a network element, to provide advanced services. The Commission has already concluded that CLECs are ahead of ILECs in current residential broadband deployment.¹⁶⁵ As discussed in detail above, *supra* at pp. 74-75, CLECs are enjoying enormous success providing advanced services, and have numerous alternatives for doing so that are better than the ILEC’s network. These CLECs have not been “forced” to offer voice – they offer data alone and are profiting immensely from doing so. It can hardly be claimed that CLECs *need* line-sharing in order to provide advanced services when CLECs are leading ILECs in the provision of advanced services *without* a line-sharing requirement.

As to voice: a line-sharing requirement is similarly without a statutory or logical basis. In order to require line-sharing, the Commission must first establish that the line – *i.e.*, the loop – must be unbundled. If the loop need not be unbundled under section 251(d)(2), that ends the inquiry and line-sharing is a moot point. If the Commission does require loop unbundling under

¹⁶³ *Second Advanced Services Order* ¶ 99.

¹⁶⁴ We will address the technical feasibility of line-sharing, as well as the immense operational and administrative problems it will cause – including the risk of severe degradation in customer service quality – in our comments in the Commission’s Advanced Services docket, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147. Our focus here is on the “necessary” and “impair” standards of section 251(d)(2).

¹⁶⁵ *Advanced Services Report* ¶ 56.

section 251(d)(2), that is all the access to the line that CLECs need to provide voice service. CLECs today buy UNE loops for voice and data, and the vast majority – if not all – of them are not line-sharing with other carriers. If line-sharing made economic sense, they would be doing so. Indeed, the Commission does not even assert that a concern with voice service motivates its line-sharing proposal. That is because the line-sharing requirement does not make voice service any more or less available. What such a requirement does instead is “decrease the ILEC’s incentive to develop innovative technical solutions that facilitate bundling, such as splitterless DSL [,] . . . [and] decrease incentives for CLECs to compete in residential telephony.”¹⁶⁶

Second, the Commission has already deemed an almost identical proposal unnecessary, and nothing has changed to justify a departure from the Commission’s previous findings. The Commission rejected requests for a time-share “long-distance loop UNE.” In 1996, long-distance carriers sought “to purchase a loop element solely for purposes of providing interexchange service”;¹⁶⁷ the ILEC would remain the “owner” of the loop when it was used to place local calls rather than long-distance ones. The loop’s spectrum, in other words, would be subdivided in the temporal domain, call by call. The Commission, however, refused to require unbundling at that level, concluding that a loop element should not be defined “in functional terms, rather than in terms of the facility itself.”¹⁶⁸ The Commission wanted local competitors to retain “maximum flexibility to offer new services,” and that meant giving such competitors

¹⁶⁶Jorde, Sidak, & Teece Aff. ¶ 64.

¹⁶⁷ *Local Competition Order*, 11 FCC Rcd at 15693 [¶ 385].

¹⁶⁸ *Id.*

“exclusive control over network facilities dedicated to particular end users.”¹⁶⁹ The Commission reasoned that “time-division” unbundling proposed by the long-distance carriers would suppress competition, not promote it. Thus, the right approach, the Commission concluded, was to extend unbundling no further than the loop itself. Long-distance carriers could purchase unbundled loops like any other competitor, just not on a time-share basis, leaving the incumbent LEC as the co-tenant responsible for whatever services the long-distance carrier declined to supply.

Third, as noted above, several major CLEC providers of high-speed services have already forged alliances with AT&T, WorldCom/MCI, and other long-distance carriers of both voice and data. These alliances can readily provide bundled voice and data services, both local and long-distance. Some data CLECs are also offering Voice over DSL (VoDSL). For instance, Rhythms has such an offering in San Diego, and Covad has offered a videoconferencing/voice/data over DSL capability to customers in Southern California. Moreover, any CLEC that does not want to offer voice service can obtain ILEC loops and unbundle the spectrum itself, selling off the voice channel to another CLEC or a long-distance carrier. Long-distance carriers have, after all, already informed the Commission that they *want* to be able to buy partial occupancy in unbundled loops.¹⁷⁰ At least one CLEC has already asked the Commission to protect its right to sell off the voice channel on an unbundled loop to another provider.¹⁷¹ In contrast, there is no

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ NorthPoint mentioned the possibility in terms of the Commission’s separate-affiliate proposal: “[I]f the [incumbent LEC’s] advanced services affiliate leases the loop and resells the incumbent’s voice service, the competitive LEC must be allowed to do likewise.” Comments of NorthPoint Communications Inc., *Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions*

evidence that either suppliers or consumers have any interest in dealing with the inevitable complexity when two independent providers attempt to provide two separate services over a single loop. These cold facts (along with all the others already discussed) belie any claim that line-sharing is necessary to ensure CLECs' ability to provide data services.

Finally, considerations of economic efficiency weigh strongly against unbundling virtual space within a single loop. A loop represents a fixed cost that does not vary with usage.¹⁷² Every new subdivision of the loop creates a new opportunity for regulatory mispricing of one of the new components thus created. Any mispricing of any element will undermine the efficient usage of the entire wire. Each unbundled channel, band, or bitstream will require a separate, prescribed price. Channels priced too low will be overused, channels priced too high will be underused, and the net effect will be higher prices, not lower, for the things the Commission most wants to keep cheap – basic voice service, access charges, and so forth. And this regulatory intervention will bring no corresponding benefits. Instead, it will bring additional costs.

In its *Second Advanced Services Order*, the Commission expresses concern that, without line-sharing, “[t]he competing carrier may need to make [an] investment in circuit technology even though that technology may become obsolete over time.”¹⁷³ The Commission is necessarily assuming that CLECs will not make such an investment with line-sharing. But that

Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996, Docket No. 98-78 (FCC filed Sept. 25, 1998).

¹⁷² See Notice of Proposed Rulemaking, *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, 12 FCC Rcd 22120, 22158-59 n.146 (1997) (“Residential loop costs . . . generally are fixed with respect to traffic on individual loops . . .”).

¹⁷³ *Second Advanced Services Order* ¶ 99.

very same economic force will operate as a disincentive for CLECs to invest in *any* technology for voice. CLECs will simply ignore the residential voice market altogether because it is not as profitable as the data segment of the market, and that will have a devastating effect on universal service and access charges.¹⁷⁴ “Given the feasibility of unbundling the entire loop for use by the CLEC, and the given desirability of increasing competition in the local telephone market, the consumer benefits of mandatory spectrum unbundling are nonexistent.”¹⁷⁵

Thus, mandated line-sharing will create a result that is certainly at odds with the 1996 Act: by mandating line-sharing, the Commission will hinder the development of competition in the local residential voice market¹⁷⁶ while giving CLECs an advantage over ILECs in the advanced services market – a market that is already fully open to competition. Section 251(d)(2), however, was designed to prevent such a perverse result.

¹⁷⁴ See Jorde, Sidak, & Teece Aff. ¶ 64.

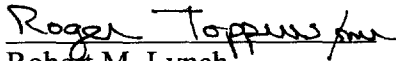
¹⁷⁵ *Id.* ¶ 78.

¹⁷⁶ Not to mention degrading the quality of service customers receive, as we will describe in our comments in the Commission’s Advanced Services docket, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147.

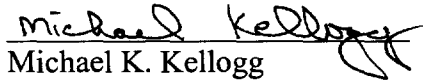
CONCLUSION

The Commission should adopt the foregoing standards to comply with the Supreme Court's mandate and section 251(d)(2).

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